Supreme Court of the United States

OCTOBER TERM, 1913.

No. 152.

SAMUEL W. CURRIDEN, *Appellant*,

vs.

FRANK L. MIDDLETON, HENRY S. BLACKMORE AND WILLIAM G. ORR.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Filed December 27, 1911.
22,985.

BRIEF OF THE APPELLANT.

[A Preliminary Memorandum.—The appellant's counsel, who have only recently fully realized the growing disposition of trial courts to discourage suits in equity, which seems to almost change the rule that such a suit may be brought where there is not at law a remedy plain, adequate and complete, to a rule that such a suit shall not be brought if by any possibility a remedy can be had in a suit at law, hereby state that they desire, if necessary, to avail their

client of the privilege given by the new equity "Rule of Practice for the Courts of Equity No. 22," and to have his case transferred to the law side of the court below and there proceeded with. Rather than be barred by the statute of limitations if the full conclusion of the courts below is sustained, they will endeavor to maintain their claim by so framing issues at law as to entitle them to a recovery. If there is, from this course, any danger of substantial injustice to the defendants it will be prevented under Rule 81.]

THE NATURE OF THE CASE.

This is a suit in equity in the Supreme Court of the District of Columbia brought by the plaintiff against the three defendants for a conspiracy to defraud him. A demurrer was filed on the ground that there could be no jurisdiction in equity, and thereupon an amendment to the bill was made, and the demurrer was renewed. The demurrer was sustained and the bill dismissed. An appeal was taken to the Court of Appeals of the District of Columbia which affirmed the decree of dismissal. A further appeal was taken to the Supreme Court of the United States, with errors assigned by the plaintiff; which is the case now pending. The errors assigned are the conclusion that the plaintiff is not entitled to a remedy in equity because he has a plain, adequate and complete remedy at law, and the dismissal of the bill. Record, p. 31.

THE FACTS AVERRED IN THE BILL.—Record, 1-18.

The plaintiff Curriden and the principal defendant, Middleton, were intimate friends, the latter being a patent attorney in active practice. Curriden had in various businesses accumulated a fortune of about $35,000. Middleton, through the defendant Orr, sought Curriden to induce him

to aid in purchasing and organizing a company to utilize a fluid called Aromaform and an automatic apparatus for handling it to prevent disease, all being inventions of the defendant Blackmore, a chemist, and all patents having been procured by Middleton. The defendants made representations as to the value of the inventions and stated that an opportune moment had arrived for purchasing them. Thereupon Curriden begun the purchase and went on to aid in organizing the company in Washington, becoming its treasurer, with Middleton as a trustee and Blackmore a trustee and consulting chemist. Curriden with an associate named Crandall urged by Middleton begun to invest money in the enterprise going on from payments to Middleton as the agent of the persons then owning the patents, of $1,500 in the beginning, until in the various efforts of the company to succeed he had paid in all about $40,000 and in connection with the failure of the company had used all his property.

Of the first payment of money to Middleton for Blackmore he retained $1,300, from $3,500. Of $20,000 paid by Curriden for rights purchased of Baltimore parties, Middleton received not less than $3,800. Of $7,500 paid for rights of Orr, Middleton received $500 and other valuable considerations.

Curriden thus becoming heavily distressed, broke down in dangerous sickness, resigned as treasurer and Middleton took possession of the company. No improvement coming, in money or health, Curriden made an agreement with the company by which upon the payment of certain notes on which he was liable, and on some of which he had been sued, he released all other claims. This agreement was only partially fulfilled and the plaintiff lost his whole fortune.

THE MOST ESSENTIAL MISREPRESENTATIONS.

The most essential misrepresentations made to Curriden were (Record, 8, 9):

a.

That Middleton was interested only as an attorney for selling the patents, expecting a moderate and reasonable fee, whereas he was otherwise directly interested in the patents and expected to receive personally a large portion of the moneys to be obtained from Curriden.

b.

That in carrying on the enterprise, deferred payments to be made could be met from sales of rights to use the patents coming from offers already made or where there were good reasons for being sure of sales already in sight, in various places specifically named—the amount reaching $50,950, all of which statements were substantially false.

c.

That the name of Chief Chemist Harvey W. Wiley could be used in promoting the new enterprise, whereas it had been agreed by the defendants that Wiley's name should not be made public or used in connection with a letter describing the invention, which he had given for a money consideration, for a special purpose only.

d.

That the patent rights covered a fluid newly discovered by Blackmore which was not merely a deodorizer or the creation of one odor to mingle with and disguise another

odor, but was a fluid which when used in the apparatus had germicide power which could change the nature of poisonous substances, destroy their unhealthfulness and by disinfecting them make them harmless; whereas in truth the fluid as used in the apparatus had no disinfecting or germicide power whatever but only an odor which might overcome other odors; and was utterly worthless for the real purposes for which it was intended to use and sell it, all of which facts all the defendants all the time well knew.

A Conspiracy to Defraud.

In the face of the foregoing misrepresentations, which on the demurrer, must be taken as having been made, the plaintiff's case on its merits may be said to rest upon the fact that all the acts of the defendants recited in the bill were parts of a conspiracy formed by them to deceive and defraud, by inducing him to purchase the patent rights and to organize a company to use and vend the same; that Curriden and Crandall were the dupes and victims of the conspiracy and were deluded agents and instruments of the defendants in organizing said company and in all the subsequent proceedings thereof; and that the company was itself an agency and instrumentality for fraud in all directions of the defendants, and especially of Middleton, for which he is personally responsible to the complainant and many other persons who have invested and lost money in connection with the patent rights. (Record, 9.)

The Defence Only a Mistaken Jurisdiction.

The only answer made to the case thus presented is that the plaintiff has mistaken his remedy, that he should have brought a suit at law and not a bill in equity to obtain a remedy for the wrongs done him by the conspiracy alleged. (Record. 11, 18.)

The dismissal of the bill in equity on demurrer in the court below involved no consideration of the equitable or other merits of the claim of the plaintiff against the three defendants on account of their alleged fraudulent conspiracy to deceive and despoil him, but the decision was made solely on the ground that it did not sufficiently appear that the plaintiff did not have his remedy, if any, in an action at law.

A Suggestion of the Statute of Limitations.

It is true that one judge below mentions an apparent reason for dismissing the bill—that "the misrepresentations appear to have been manifest to the plaintiff as early as 1905, certainly as early as 1906, when he made an arrangement with the corporation to be relieved of his liability upon his obligations"—the bill not being filed until 1910 and the period of limitations being three years. (Record, 24.)

This statement, however natural it may have seemed, was entirely a mistake—the plaintiff, although he had, while under deception and seriously sick, agreed to a settlement with the company which the defendant Middleton, having taken possession of its assets as a one-man corporation, failed to fulfill, had not, until after these occurrences, become fully informed and convinced of the deceptions practiced upon him by the defendants and three years had not elapsed from the time his right of action accrued.

Moreover, there is upon the bill no real question of the statute of limitations as such, but only whether the plaintiff has been guilty of laches under the rule laid down in Kirby vs. Lake Shore, 120 U. S., 130.

The plaintiff did not bring his suit in equity rather than at law because any period of limitations had run against

his claim but only because his counsel believed the equitable grounds for relief set forth in the bill entitled him to a remedy therein. He had not then discovered the extent to which courts in recent years had swung away from suits in equity in connection with the improved facilities for making suits at law effective.

To now affirm the decision of the Court below dismissing the bill and to apply to the plaintiff the statute of limitations in any suit at law he may bring would be most unjust. Fortunately the application of the new rule in equity No. 22 would prevent any such denial of a hearing of the merits of the plaintiff's claim.

Concise Repetition of Facts and Grounds for Relief in Equity.

The plaintiff submits that neither in his bill nor in any brief on a demurrer should he be required to state at length the complicated facts of fraud which entitle him to a remedy in equity and need not be charged and made into a declaration in law.

The plaintiff's counsel did not believe that a long and elaborate recital of facts which they knew and facts which they suspected, would be necessary to demonstrate that they were fairly entitled to have jurisdiction taken of their bill in equity.

But the plaintiff here repeats the averments which he believed would be more than sufficient.

IV.—Record, 13.

That in the progress of the deceits practiced upon him concerning the real ownership of the patents and rights thereunder, the alleged offers to buy rights to use the same, the prescribed non-user of Chief Chemist Wiley's letter and

the use of aromaform as a disinfectant and not merely as a deodorizer, the principal deceiver and chief conspirator was the defendant Middleton; that the organization of the American Automatic Disinfectant Company was only his creation of an agency for his purpose, and in its whole course was only a one-man corporation, designed, pressed forward and utilized by him to aid in deluding the complainant and others, inducing him and them to assume liabilities and obtaining from him and taking to himself the large sums of money which the complainant was led to advance.

V.—Record, 13.

That the facts set out are extremely complicated and that a proper investigation thereof would be long and difficult; that the books, papers, documents and records from which the facts can be ascertained passed into the possession of the said Middleton when he dropped the complainant from the board of directors of the American Automatic Disinfectant Company, and that an examination thereof is indispensable to enable any one to unravel the complications of facts bearing upon the question of the frauds alleged against the defendants.

VI.—Record, 14.

That while from such careful investigations as he has been able to make, with the evidence accessible to him, he has been led to believe and continues to believe the truth of all the foregoing averments and those of the original bill of complaint, and that the defendant Middleton has been guilty of such frauds and fraudulent representations as made him personally liable to the complainant for all his advancements, payments and losses in connection with the purchase of said patents and rights thereunder yet the com-

plainant was not and is not sufficiently sure of the facts to make him willing to begin an action at law and invoke a trial by jury; wherefore he determined to seek further enlightenment by means of disclosures to be required of the defendants Middleton, Blackmore and Orr.

VII.—Record, 14.

That he was duly advised by counsel whom he consulted that being in doubt whether the facts known to him would give him a complete right of action, based upon the alleged frauds committed by the defendants, and realizing that such facts and others connected therewith were complicated and ascertainable only from an examination of books and papers in the possession of the defendants, and by disclosures as aforesaid, therefore he was entitled to the assistance of a court of equity to obtain a disclosure by the defendants, in due course, of all pertinent facts and to obtain access to such books and papers and make an examination thereof, and entitled after and in connection with such disclosure and examination to have a full and accurate accounting made by the defendants concerning all complicated and fraudulent transactions which might be disclosed.

VIII.—Record, 14.

That the defendants ought to answer on oath thirty-four questions recited in the amendment to the bill.

The grounds upon which the plaintiff conceived that he was entitled to seek a remedy in equity were

I.

That the case was one of complicated fraud, the Aromaform Company being an agency of Middleton for victim-

izing his confidential friend the plaintiff; the whole of the corporation, its property, business and accounts, passing into the hands of Middleton and his co-conspirators, leaving the plaintiff sick, helpless and without a dollar in the world.

II.

That a discovery and a special accounting were needed in order to enable the plaintiff fully to ascertain and state his claim that he should be made whole by the defendant Middleton who had used the faith reposed in him to lead the plaintiff on to destitution.

III.

That the form of remedy would be doubtful until the facts should be fully disclosed, the assets ascertained and utilized, the number of victims known and their respective merits determined.

AUTHORITIES RELIED ON.

(1.)

Authorities as to jurisdiction in equity in cases of complicated fraud.

Story's Eq. Jur., Vol. 1, Sec. 184, *Ibid.*, Vol. 1, Sec. 437, page 466.

Ibid., Vol. 2, page 698, Section 1265: "The truth is, that courts of equity, in regard to fraud, whether it be constructive or actual, have adopted principles exceedingly broad and comprehensive, in the application of their remedial justice; and, especially, where there is any fraud touching property, they will interfere, and administer a wholesome justice, and sometimes, even a stern justice, in favor of innocent persons, who are sufferers by it, without

any fault on their own side. This is often done, by converting the offending party into a trustee and making the property itself subservient to the proper purposes of recompense by way of equitable trust or lien."

Ibid., Vol. 1, page 468, Sec. 439: "Accident, mistake, and fraud, are of an infinite variety in form, character, and circumstances; and are incapable of being adjusted by any single and uniform rule. Of each of them, one might say, *Mille trahit varios adverso sole colores.* The beautiful character, or pervading excellence, if one may so say, of Equity Jurisprudence, is, that it varies its adjustments and proportions, so as to meet the very form and pressure of each particular case, in all its complex habitudes."

Suits in equity allowed between all persons "standing in fiduciary relations to each other." See 1 Pomeroy, S. 179, S. 186. See 2 *Ibid.*, 955, 963. "Indeed all persons who occupy a position of trust and confidence, of influence and dependence in fact although perhaps not in law." See authorities in note.

"A person consulting an elder and distant relative or a confidential friend." Note 7 (G), page 1792. "A confidential adviser."

See Pomeroy, S. 957, in note. Smith vs. Kay, 7 H. L. Cas., 750. Lord Kingsdowne said that the equitable principle applied in all cases "in which confidence has been reposed and betrayed."

The case against Middleton is that through his deceit and fraud the whole enterprise became his and the American Automatic Disinfectant Company was his one-man corporation. Curriden was only his dupe and therefore his agent and subordinate. See Harvard Law Review, January, 1904, page 201. *In re* Carl Hirth, 1 Law Rep.; *In re* Slobodinsky (1903), 2 K. B., 517. Treasury Branch Div., 1889, pages 612, 618, 624.

(2.)

The details of fraud are not necessary to be stated in the bill. "Every bill must contain sufficient matter in itself to maintain the case of the plaintiff (Harrison vs. Nixon, 9 Peters, 483); but it need not allege or specially describe all the evidence which is to be put into the case, provided it contains allegations broad enough to cover the evidence relied on."

Nesmith vs. Calvert, 1 Wood & M., 34. Forms of Federal Practice—Loveland—Vol. 1, page 237.

(3.)

Cases where the need of discovery is a ground of jurisdiction. 1 Pomeroy, S. 223, 314, 299. Reynolds vs. Burgess, 71 N. H., 332.

(4.)

Cases where jurisdiction is taken in order to secure an adequate accounting. 1 Pomeroy, S. 186, 319. 4 *Ibid.*, S. 1420.

"Where there are circumstances of great complication and difficulties in the way of adequate relief at law." *Ibid.*, 1421. See Badger vs. McNamara, 123 Mass., 117. Gray, C. J. "Account so complicated that it can not be taken in an action at law."

(5.)

Equity not lost because only money relief is demanded. 1 Pomeroy, S. 178, page 214; 4 Pomeroy, S. 416; 5 Pomeroy, S. 11.

(6.)

AUTHORITIES AS TO STATUTE OF LIMITATIONS.

The ordinary limitation of actions at law is given in Sec. 1265, Ch. XLI, Code of D. C., but in Section 1640, Ch. LX,

it is provided that "nothing shall affect the operation or enforcement in the District of Columbia of the principles of equity."

In Kirby vs. Lake Shore R. R. Co., 120 U. S., 130, the U. S. Rule is stated:

> "Regard the cause of action as having accrued at the time the fraud was or should have been discovered and thus withhold from the defendant the benefit in the computation of time of the period during which he concealed the fraud."

Read Judge Harlan's remarks beginning, "Be that as it may," etc.

LAW REPORTS—MODERN AND ANCIENT, 270. TERM. MICH., 3, GEO. II, 1729.

WATLINGTON AND WILKINSON, & AL. WATLINGTON AND BRAND.

HOW FAR THE STATUTE OF LIMITATIONS IS A GOOD PLEA TO A BILL IN A COURT OF EQUITY.

> Canc. "These were two causes, wherein the defendants were charged with carrying on a fraud in 1720 by drawing people into a bubble, called the Orkney-Fishery. The bills were brought to have a discovery of this fraud, and the money refunded. The defendants in the first cause pleaded the statute of limitations in bar to the discovery; and by way of answer, set forth in particular, that there was no fraud. The defendant in the second cause set forth, that he was only cashier to the proprietors, and barely as to that part of the bill, which required him to refund the money the adventurers had put into his hands, pleaded the statute of limitations; and denied that he knew anything of

fraud or that he was one of the managers; and for answer said, that he was willing to make a discovery of any thing he knew, and ready to account, if the Court should be of opinion, that he ought to do so. The Solicitor General was counsel for the defendants in the first cause, and urged, that it was most known and certain, that if their had been no fraud suggested in the bill, the plaintiffs could not come into a court of equity and pray relief, when they had stayed too late for having any in the courts of law. And as to the foundation of Fraud, it was discovered from the very first, and there was equal reason, that a complaint of this sort should be confined to be made within the time limited by the statute, as any other. And this, he said, was clearly allowed in Lord Warrington's case, that was lately before the House of Lords and the judges required to attend in it. But the great debate in that case was, if a fraud should happen to be detected after six years, whether the party was too late to apply for relief. The House of Lords were indeed of opinion, that the party was not too late in that case; but the difficulty they had upon them in getting over that point, was a full argument that they well were satisfied, that he would be too late in the other. Lord Chancellor said, that this was a matter which well deserved some consideration; but thought clearly, that this plea could not be a bar to the plaintiff's requiring a discovery of the fraud; and then indeed it might be proper to consider whether the plaintiff knew of it so soon. as to have been obliged to have brought his bill before. Accordingly his Lordship ordered, that the plea should stand for an answer with liberty to except however to the plea of the defendant in the second."

Of course it is to be noted that this case was in the year 1729!

The cases of Tyler vs. Savage and Buzard vs. Houston.

The Court below appears to base its opinion upon its view of the decision in Buzard vs. Houston, 119 U. S., 347, which is thus stated: "Buzard vs. Houston is a strong authority for the proposition that where the only relief sought is a money decree for damages occasioned by fraud and deceit, the remedy at law is adequate and exclusive."

That proposition is clearly erroneous in the light of the later decision in Tyler vs. Savage, 143 U. S., 79, where although the only relief finally sought was a money decree for damages occasioned by fraud and deceit, the Court awarded relief by just such a decree because, by reason of the circumstances of the case, the remedy at law was not adequate and exclusive. The Court, in pointing out the difference between that case and the case of Buzard vs. Houston, indicated that the question of equitable jurisdiction turned on the nature and circumstances of the case and not on the particular nature of the relief or the form of the decree at last sought.

The case at bar is wholly unlike Buzard vs. Houston. In that case, by deceit, the defendant induced the plaintiffs to cancel their agreement with defendant and to accept in lieu thereof an assignment from him of his contract with an insolvent third party. There appeared to be no complicated scheme of fraud, no need of discovery, and no circumstances making it more difficult for the plaintiff to proceed at law than in equity; he simply had to go ahead with his original claim, and the Court found the legal remedy was "plain, adequate and complete." Yet even that decision was not unanimous. See the dissenting opinion of Mr. Justice Bradley.

In Tyler vs. Savage the plaintiff had by misrepresentation and fraud induced the plaintiff below to invest

$10,000 in the worthless stock of the corporation of which Tyler was president, and in order to make out her case she called on him to answer specific interrogatories just as was done in the case at bar. The final decree held Tyler individually liable for the $10,000, and required him to pay it to the plaintiff with interest.

That case and the case at bar are alike in all particulars bearing on the question of equitable jurisdiction. Even with the aid of the Code D. C., Sec. 1072, the plaintiff would not have a "plain, adequate and complete" remedy at law. The case is one in which complete justice may be obtained only in a court of conscience, where the defendant is required to answer fully under oath to the plaintiff's allegations and specific interrogatories, and where the chancellor may hear and consider all the testimony which the plaintiff may adduce, and may mould the decree in accordance with all the facts established by the proofs.

In Tyler vs. Savage the head note of Mr. Justice Blatchford's opinion was as follows:

> "A decree in a suit in equity found that T., an individual defendant, and the remaining assets of a corporation defendant, were liable to the plaintiff for the sum of $10,000 paid by him into the treasury of the company, at the instance of T., for a certificate of stock therein, which company was represented to him by T., who was its president, to be in a flourishing condition, when in fact it was insolvent; and distributed $176.24 as the remaining assets of the company, of which $13.24 went to the plaintiff as a credit on his claim for $10,000; and decreed that T. pay to the plaintiff $10,000, subject to a credit of the $13.24. There was no demurrer to the bill for multifariousness, and no objection taken in the court below for want of equity. The bill set out fraud in T., and that the $10,000 was due to the plaintiff by T., and the company, and required answers to interrogatories, which answers re-

ferred to the books of the company for information: Held; To support jurisdiction in equity, there were in the case discovery, account, fraud, misrepresentation and concealment; the objection to the jurisdiction was not taken in the court below; and the case was not one of a plain defect of equity jurisdiction, under Sec. 723 of the Revised Statutes."

The Court then cited Story's Eq. Jur., Secs. 64 K, 67, 184, 191; Jones vs. Bolles, 9 Wall., 364, and said:

"Under Section 723 of the Revised Statutes the remedy at law in order to exclude equity must be as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity."

Boyce's Executors vs. Grundy, 3 Peters, 210; Insurance Co. vs. Bailey, 13 Wall., 616.

Conclusion.

In the opinions of the courts below various points are mentioned for the purpose of sustaining the inference that there is no need of equity remedies in this case. Record, 19-24, 27-30.

These points are:

1. That no confidential relations in a *technical sense* are alleged.
2. That Middleton was not the plaintiff's attorney.
3. That there was no partnership.
4. No allegation of existing property representing money which the plaintiff ought to receive.
5. No effort to impress any property with a trust.
6. No requirement that the defendants should state what has been done with the money.
7. No rescission of any contract demanded.
8. No offer to turn over the stock certificate which the plaintiff has;

While the Courts say that in Tyler vs. Savage:

9. There was an *accounting* prayed for.
10. A movement to have the assets realized quickly.

11. A claim that the plaintiff's money paid in for stock should be made a debt of the one-man corporation.

12. An application for a *receivership* and

13. An application for an *injunction*.

All these thirteen objections, except the first three, can be fairly met by simply saying that everyone of the necessary or desirable conditions demanded can and naturally may and perhaps should come to appear in the course of the present case as it stands on the averments in the existing bill in equity.

There should be (13) an application for an injunction and (12) for a receivership, (11) a claim that the plaintiff's money should be made a debt, (10) a motion that the remaining assets should be realized quickly and (9) a full accounting by the defendants for all the moneys received by them in the progress of their imposture.

These five features of a suit in equity and also those suggested in points 4 to 8, inclusive, all fairly and naturally grow out of the suit in equity upon the pleadings as they stand, and any lack of such present averments does not weaken the plaintiff's right to maintain his suit in equity on the ground that he has not a remedy at law, plain, adequate and complete. In due time all these methods of an equitable remedy are likely to be asked for.

After all such due proceedings there can be an adjusting of the remedy to the exact wrong done—a fitting of the punishment to the crime.

The defendants' counsel are courteously requested to submit in their brief a form of declaration at law which they think would be a good one and it will perhaps be adopted if this case goes back to the courts below under Rule 22.

It is easy to claim in a declaration at law the $5,500 which went directly from the plaintiff's moneys to the defendant Middleton; it is not easy to frame exactly the

remedy for the complicated frauds by which he succeeded in getting from the plaintiff the additional $35,000 which was taken from him. Yet to do this seems fairly to be the duty of the counsel if a declaration can be drawn which will state a remedy plain, adequate and complete.

But the counsel for the despoiled plaintiff respectfully submits that his suit in equity on the present pleadings should be allowed to take its legitimate and just course.

WILLIAM E. CHANDLER,
LORENZO A. BAILEY,
WILLIAM L. CHAMBERS,
Counsel for the Appellant.

Filed January 8, 1914.